No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEEKMAN PAPER CO., *Petitioner*,

v.

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 31, 1991

QUESTION PRESENTED

Does the decision of the Second Circuit affirming the lower court's failure to deny respondents' removal petition from the state court under 28 U.S.C. § 1446(b)&(c); and, petitioner's motion to remand under 28 U.S.C. § 1447(c), when as a matter of law there was no basis for said decision - especially so since the respondents' position was perjury as a matter of law - not only conflict with this Court's and the Circuit's decisions and depart so far from the usual and accepted course so as to call for this Court's supervision; but, perhaps stronger, threaten the constitutional principle of FEDERALISM, especially since there was no jurisdiction in the federal system to decide anything other than that there was no federal jurisdiction?

LIST OF PARTIES

The parties to the proceeding below were the petitioner BEEKMAN PAPER CO., and the respondents CRANE & CO., INC., RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS.

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The petitioner Beekman Paper Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on October 4, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is not published by order of said Court, and is reprinted in the appendix hereto, a 1, *infra*.[1]

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[1]References to the record in the Second Circuit are from the Joint Appendix ("1").

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1446(a)&(b), respondents sought to remove the previously brought action against them by petitioner in the state of New York; and, petitioner invoked federal jurisdiction under 28 U.S.C. § 1447(b) seeking remand back to the state court.

On petitioner's appeal, the Second Circuit affirmed.

The jurisdiction of this Court to review the judgment of the Second Circuit is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. §§ 1446(a)&(b), and 1447(b) are reprinted in the appendix hereto, a 7 *infra*.

STATEMENT OF THE CASE

Introduction

Beekman ("petitioner"), a New York corporation since 1916, engaged in the distribution of fine printing paper, had enjoyed

for more than a quarter century until in 1990 Crane ("respondents") terminated it, a distributorship agreement with Crane. Ignoring the clear custom and usage in the paper industry and as specifically agreed to by Crane and Beekman, Crane terminated Beekman as a distributor without cause, asserting reasons it could not and did not prove.

Beekman sued Crane in New York. All defendants were served but only Crane sought removal. More than thirty days passed following the service of process upon all the defendants, including in Massachusetts by a sheriff of the state. Then, Beekman moved to remand to New York.

Crane and the other respondents - Kerans, White, and Davis, - after Beekman's remand motion now all joined in the removal petition claiming they had not been properly served with process. This, despite having just a week earlier moved along with Crane in the federal action below to dismiss Beekman's complaint for

failure to state a cause of action substantively, (i.e. claiming oral agreement terminable at will). Thus all defendants (i.e. respondents) not only conceded then that all had been served with process, but they - the non Crane defendants as Crane - were by the motion to dismiss on substantive grounds - showing their eagerness to advance the litigation as bona fide served defendants.

The state summons and complaint was served properly upon all defendants, (77-80)[2]. In Massachusetts, the sheriff's office served White and Kerans, (77-78, 129-32). White was served at Crane's Massachusetts headquarters, (13-14), on December 20, 1990, personally by the sheriff, at 3:45 P.M. Sheriff Marcella, clearly identified White's description, (77). The attorneys for White, (and all the defendants), admitted that at the very moment White was served, he was "in his office [Crane] that day",

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[2] References to the record are the Second Circuit joint appendix, e.g., ("1").

(156); but the reason the sheriff was able to so accurately describe White was because:

> "As to the [White] description, Crane is pretty big in Dalton. And we have every reason to believe White is a man of the community, and the process server may know what he looks like...." (156; emphasis supplied).

Thus White's attorney - without seeking a hearing - baldly denied that White was so served, claiming White got the process from another employee; that there was no subsequent mailing to White[3], (156). White simply claimed no service without any offer of fact or believable fact, (103-04).[4]

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[3] Correct. Personal service under New York law C.P.L.R. § 308(2), obviates that requirement.

[4] At the district court level White's attorneys, a large, respected, experienced national law firm, did not explain why either they did not catch this alleged bad service before Beekman's remand motion, or what in fact was their knowledge of the service; relying instead on specious avoidance, (11, 27; see especially 100, ¶ 4; 152-54).

Beekman's counsel at every opportunity challenged defendants and their attorneys to do more than make their absurd, bare bones fact

Kerans was served also on December 20, 1990, at Crane's headquarters, 3:45 P.M., by the sheriff of Massachusetts leaving the summons and complaint with "Bonnie Jennings his executive secretary", whom he exactly describes; then mails another copy to Kerans, (78). Keran's affidavit is as mendacious as White's. Without any supporting documents or an affidavit from Ms. Jennings, he denies she is his secretary,[5] yet somehow, "later received the...Summons and verified Complaint that Ms. Jennings had received". Kerans claims not to have received the mailing, (102-102A).

Beekman challenged Keran's and his attorneys as he did White to make proof; they failed.

Davis was served in New York on December 12,

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denials of service, (63-4, 108-110, 112-17, 129-32, 136-45, 147-50, 161-62). The record is clear: neither respondents or their attorneys have even made an attempt.

[5] An irrelevancy under the CPLR of New York since the receiver need only be a person of suitable age and discretion, clearly the case as the unanimous New York decisional law compels.

1990 by the same licensed process server who - uncontestedly - served Crane, (79-80). The process was left with "Jacquilen Gardner", who is precisely described and identified, followed by a mailing, (80). Davis' affidavit opposing Beekman's papers on the removal and for remand was replete with even more mendacity than White's and Kerans'. He denied Crane's New York existence at its exact New York address; that Ms. Gardner was employed by Crane; and, that he ever got a mailing[6], (105-07).

Davis's additional, desperate attempt to avoid the service is shown by the record conclusively proving every "fact" denying Crane's New York identity to be pure mendacity, (13, 114-15, 121, 122-23, 124-28).

Equally significant, the petition for removal brought only by Crane, was dated January 2, 1991, (6-11). However, on January 9, 1991, less

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[6] Thus, two process servers in two states perjured themselves on everything; except that, (according to defendants), maybe the mail got lost every time.

than one week later, all defendants moved to dismiss the complaint on substantive, not procedural, grounds, (29-34, 87-88). All the non Crane defendants would never have so moved if in fact they had not been validly served.[7]

REASON FOR GRANTING THE WRIT

The Second Circuit's decision refusing remand and upholding removal was an unconstitutional as well as unlawful misuse of federalism

Under 28 U. S.C. § 1446(a)&(b), the Petition for Removal must be joined in by all defendants and within thirty days of service of process. See 14A Wright, Miller, Cooper, Federal Practice and Procedure § 3723, p. 308 (West

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[7] Thus if respondents had any case for removal, it was waived since they all moved to dismiss for failure to state a cause of action, thus continuing their status as defendants and necessarily conceding service upon them, since a party cannot seek removal of an action that has not yet come into bona fide legal existence, i.e., invalid service.

Thus, White, Kerans, and Davis, joining in the removal petition on January 30, 1991, (99-107), was considerably more than 30 days after all were served.

1985). This is the law as pronounced by this Court, Kinney v Columbia Savings & Loan Ass'n, 191 U.S. 78 (1903).

The Second Circuit opinion is also in hideous conflict with its and its district court decisions. See, Synergy Gas Co. v Sasso, 853 F.2d 59, 62 (1988); McKay v Point Shipping Corp., 587 F. Supp. 41, 43 (S.D.N.Y. 1987); People v Mitchell, 637 F.Supp. 1100, 1102, (S.D.N.Y. 1986); Gold v Blinder Robinson & Co. Inc., 580 F.Supp. 50, 54, (S.D.N.Y. 1984); Golar v Daniels & Bells, Inc., 533 F. Supp. 1021, 1024 (1982); Touche, Ross & Co. v Manufacturers Hanover Trust Co, 503 F.Supp. 222, 223 (S.D.N.Y. 1980); D. Meglio v Italia Crociere Internationale, 502 F. Supp. 316, 318 (S.D.N.Y. 1980). Acccd, Universal Motors Group v Wilkerson, 674 F. Supp. 1108, 1110 (S.D.N.Y. 1987); Boland v Bank Sepah-Iran, 614 F. Supp. 1166, 68 (S.D.N.Y. 1985), strictly construing the removal statute against removal and in

favor of remand under 28 U.S.C. § 1447(c)[8], citing to the thirty day requirement of 28 USCA § 1446(b); Martropico Compania Naviera S.A. v Perusahaan, etc, 428 F. Supp. 1035 (S.D.N.Y. 1977).

The Second Circuit decision conflicts no less with every other federal circuit.[9] Its reliance upon Sicinski v Reliance Funding Corp., 461 F.Supp. 649, 652 (S.D.N.Y. 1978) (a 7) reduces to a trifle the concept of federalism. In Sicinski, the attorney simply forgot to sign the permission to remove - hardly the case here.

A fortiori its allowance of clear perjured - ludicrous really - contestation of the affidavits of service by state licensed

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[8] All the authorities cited herein for removal speak concurrently to remand.

[9] See, Garza v Midland Nat'l Ins. Co., 256 F. Supp. 12 (D.C. Fla. 1966); Dodrill v New York Cent. RR., 253 F. Supp. 564 (D.C. Ohio 1966); McGlasson v Barger, 220 F. Supp. 938 (D.C. Colo 1963); Norwich Realty Corp. v U.S. Fire Ins. Co., 218 F. Supp. 484 (D.C. Conn. 1963).

(sheriff, etc) officials (a 4-5). This position is preposterous: until this decision by the Second Circuit no Circuit would tolerate such naked, state court jurisdiction robbing. See, San Rafael Compania Naviera, S.A. v American Smelting & Rel. Co., 327 F.2d 581 (9th Cir 1964); Hicklin v Edwards, 226 F.2d 410 (8th Cir. 1955).

See especially, Hill v Sands, 403 F. Supp. 1368 (D.C. Ill. 1975). Accd, Trustees v Perfect Parking, 126 F.R.D. 48, 52 (N.D. Ill. 1989); Republic Productions, Inc. v American Federation of Musicians, 173 F. Supp. 330 (D.C.N.Y. 1959); Halpert v Appleby, 23 F.R.D. 5 (S.D.N.Y. 1958).[10]

At risk here is over a century of congressional intent respecting the states' rights to their proper court jurisdiction under principles of federalism. See, Judiciary Act 1789,

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[10] In the process bulldozing its own, good law lower courts' holdings. See e.g., Vozeh v Good Samaritan Hospital, 84 F.R.D. 143, 144 (S.D.N.Y. 1979).

Ch.29, 21 Stat. 73, 79-80.[11]. Equally, this Court has historically strictly construed the acts of Congress to avoid defeating unlawful, i.e., non statutorily justified defendant attempts to remove to the federal courts, Shamrock Oil & Gas Corp. v Sheets, 313 U.S. 100 (1941). See especially, Louisville & Nashville R.Co. v Mottley, 211 U.S. 149 (1908); American Fire & Casualty Co. v Finn, 341 U.S. 6 (1951).

The egregiousness of the result below is intensified by the recognition that the uncontested record shows that Beekman had

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[11]That historically has meant removal only upon proper use of statutory law, Martin v. Hunter's Lessee, 1 Wheat. 304 (U.S.1816); The Moses Taylor, 4 Wall. 411, 429-30 (1867); The Mayor v Cooper, 6 Wall. 247 (U.S.1868); Railway Co. v Whitton, 13 Wall. 270 (U.S.1872); Cain v Commercial Publishing Co., 232 U.S. 124 (1914); Great No. Ry. v Alexander, 246 U.S. 276 (1918), etc.

Indeed, while Congress has broadened, tailored, etc, the statutory basis, see e.g., Judiciary Act of 1987, 24 Stat. 552, as modified by Act of August 13, 1888, 25 Stat. 433, carried on in essence to this day, nothing allows what has gone on in the instant case under color of proper awareness of federalism.

without basis in fact or law an exclusive distributorship terminated abruptly by respondents after a quarter century; and, by a federal district judge with no more authority to so decide than Hauptmann had to kidnap the Lindberg baby.

CONCLUSION

For these various reasons, including most prominently concepts of federalism, this petition for certiorari should be granted.

Respectfully submitted,

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December 31, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of October, one thousand nine hundred and ninety-one.

FILED OCTOBER 4, 1991

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE JOHN M. WALKER

HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges.

BEEKMAN PAPER COMPANY,

Plaintiff-Appellant, ORDER

v. Docket No. 91-7538

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,

Defendant-Appellees.

A1

Appellant Beekman Paper Co. (Beekman) appeals the February 13, February 28, and April 29, 1991 orders and judgment of the United States District Court for the Southern District of new York (McKenna J.) denying its motion to remand the case to state court dismissing its complaint and entering judgment in favor of appellee Crane & Co., Inc. et al. (Crane).

Crane manufactured high quality paper that Beekman had distributed for more than 25 years pursuant to an oral agreement. According to Beekman, custom and usage in the trade precluded termination of the distributorship absent unsatisfactory performance on its part. Further, according to Beekman, despite its satisfactory performance, Crane terminated the distributorship on October 30, 1990, effective February 28,1991. Beekman sued Crane, its president (White), its manager (kerans) and one of its sales representatives (Davis) collectively the "individual defendants") in the Supreme Court of New York, New York County, on December 12, 1990. On January 2, 1991 Crane filed a petition for

removal in the Southern District, jurisdiction premised on diversity of citizenship. Beekman sought to have the action remanded to state court, which the district court denied on February 13.

On february 28, the district court dismissed Beekman's causes of action for breach of contract,anticipatory breach of contract, and for punitive damages, all without leave to replead. Beekman's causes of action for intentional interference with contractual relations, conspiracy and for trade disparagement were dismissed with leave to replead. Beekman did not replead, and the trial court dismissed the complaint in its entirety on April 19. Judgment was entered for the defendants on April 29.

(1) On appeal, Beekman challenges the district courts refusal to remand the action to state court. Pursuant to U.S.C. § 1446(a), "[a] defendant or defendants desiring to remove...shall file in the district court...a notice of removal...." consequently its motion

to remand should have been granted, because all defendants did not join in the petition. Plaintiff's contention is that the petition was deficient because made only by Crane. The individual defendants claimed their failure to participate in the petition was justified because service as to them was deficient. Only properly served defendants need join in the petition. Further, we agree with the district court's holding that even if, arguendo, the individual defendants were properly served and failed to join in the petition, such defect is curable, especially in the absence of any showing of prejudice to plaintiff. See Sicinski v. reliance Fundings Corp., 461 F. Supp. 649, 652 (S.D.N.Y. 1978) (of primary importance is only the defendants be unanimous is their choice of a federal forum). Consequently, the affidavits of the individual defendants indicating their consent to the removal, on the facts here, were sufficient to satisfy the requirements for removal. Whether service was proper or not and whether objections to service

were waived are irrelevant.

(2) Appellant also challenges the district court's dismissal of its causes of action for breach of contract and anticipatory breach of contract. Beekman alleges that pursuant to custom and usage in the industry, a distributorship agreement may only be terminated for cause. That may be so. Nonetheless, because the alleged oral agreement contained no term limitation and could not be performed within one year, it falls within the New York Statute of Frauds and is hence unenforceable. See D & N Boening, Inc. v. Kirsch Beverages, Inc., 63 NY2d 449 (1984). As plaintiff concedes, according to the terms of the agreement, only by its (plaintiff's) failure to perform adequately, i.e., breaching the agreement, could defendant justifiably terminate. However agreements "terminable within one year only upon a breach of one of the parties" are within the Statute of Frauds. Id. at 456. If the agreement between the parties was in some form reduced to writing or otherwise not within the Statute of Frauds then

the agreement could be enforceable. Only then would ambiguity or silence as to termination make custom and usage in the trade relevant to assessing the terms and/or conditions under which the putative distributorship could be terminated.

(3) We have reviewed plaintiff's other contentions and find none of them to have merit.

The orders and judgment are affirmed.

s/
Richard J. Cardamone, U.S.C.J.

s/
John M. Walker, U.S.C.J.

s/
Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

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§ 1446 Procedure for removal

(a) A defendant or defendants desiring to remove any civil action...from a State court shall file in the district court of the United States...a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal....

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim upon which such action or proceeding is based....

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice for removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.